

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RECO ENGLISH,	:	NO. 1:11-CV-00675
	:	
Petitioner,	:	
	:	
v.	:	OPINION AND ORDER
	:	
ED BANKS, WARDEN, NOBLE	:	
CORRECTIONAL INSTITUTION,	:	
	:	
Respondent.	:	

This matter is before the Court on the Magistrate Judge's Report and Recommendation (doc. 15), Petitioner's Objection (doc. 19), and the Magistrate Judge's Supplemental Report and Recommendations (doc. 21). For the reasons indicated herein, the Court ADOPTS and AFFIRMS the Magistrate Judge's Report and Recommendations (docs. 15, 21) and DISMISSES the Petition with prejudice.

Petitioner filed his pro se Petition for a Writ of Habeas Corpus to challenge his convictions in the Hamilton County Common Pleas Court on two counts of possession of cocaine with firearm specifications and two counts, subsequently merged, of possession of weapons under disability (doc. 1). Petitioner alleges twelve grounds for relief, each of which Magistrate Judge Merz scrutinized carefully, and found without merit (doc. 15). The Magistrate Judge recommended the Petition be dismissed with prejudice and that Petitioner be denied a certificate of appealability, as any appeal

would be objectively frivolous (Id.).

In his Objection, Petitioner challenges the Magistrate Judge's conclusion as to each ground, with the exception of ground four, which he appears to have abandoned (doc. 19). Petitioner wrote an extensive brief, and acknowledged that though he might not have spelled "out his Constitutional violation as might a license[d] attorney, [he] did the best he could do (Id.). The Court agrees Petitioner clearly made a good effort. In Response, the Magistrate Judge filed a Supplemental Report and Recommendation, in which signaled that Petitioner made incorrect assertions in his briefing as to grounds one, two and seven, and demonstrated that the Petition should be dismissed with prejudice (doc. 21).

The Court has reviewed this matter and ultimately agrees with the Magistrate Judge that Petitioner's ground one has been procedurally defaulted, and that in any event, there is no basis for a claim of vindictive sentencing. The Court agrees there was sufficient evidence to support Petitioner's conviction based on the testimony of Officer Fangman, which the jury was entitled to believe. As such, grounds two and seven fail. Petitioner's Fourth Amendment and Confrontation Clause claims fail because the former is barred by Stone v. Powell, 428 U.S. 465 (1976) and the latter was procedurally defaulted. Grounds three and six therefore fail.

The Magistrate Judge correctly concluded Petitioner's ground five, ineffective assistance of trial counsel, was procedurally defaulted for failure to include it in a timely petition for post-conviction relief under O.R.C. § 2953.21, and also for failure to appeal the dismissal on such basis to the Ohio Supreme Court. Petitioner failed to respond substantively to the Report's conclusion that he procedurally defaulted on his claim for prosecutorial misconduct. The Court therefore adopts the Magistrate Judge's conclusion that ground eight fails. Similarly, Petitioner's ground nine based on denial of a continuance fails for procedural default, and also because Petitioner in no way showed how he was prejudiced by such denial.

Petitioner's ground ten, claiming the Hamilton County Court of Appeals refused to consider his pro se Supplemental Brief, fails for procedural default and because there is no constitutional right to hybrid representation. Ground eleven, regarding the admission of the Officer's testimony used against him, is barred for procedural default, and is also lacking in merit, as such testimony was admissible and constitutional. Finally, the Magistrate Judge correctly rejected ground twelve, as the Supreme Court has not recognized "cumulative error" claims.

Having reviewed this matter de novo, the Court finds the Magistrate Judge's Report and Recommendation thorough, well-reasoned and correct. Accordingly, the Court ADOPTS and AFFIRMS

the Magistrate Judge's Report and Recommendations (docs. 15, 21) in all respects, and DISMISSES Petitioner's Petition (doc. 1) with prejudice, as each of the twelve grounds raised are either procedurally defaulted, lacking in merit, or both. The Court further DENIES a certificate of appealability, and CERTIFIES that any appeal would be objectively frivolous. Finally, with respect to any application by Petitioner to proceed on appeal in forma pauperis, the Court CERTIFIES pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this Order would not be taken in good faith, and therefore the Court DENIES Petitioner leave to proceed on appeal in forma pauperis upon a showing of financial necessity. Fed. R. App. P. 24(a); Kincade v. Sparkman, 117 F.3d 949, 952 (6th Cir. 1997).

SO ORDERED.

Dated: May 29, 2013

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge